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Oil and Gas Reservations

A recent Nebraska case, *Elrod v. Heirs, Devisees, etc.*,¹ presents for the first time in Nebraska the interesting question of the validity and effect of a reservation of an interest in oil and gas contained in a grant or conveyance of land. The purpose of this comment is to examine the validity and effect of various types of oil and gas reservations.

Reservation of "Minerals"

A grant or conveyance of land contains a reservation of "all minerals in or under" the land conveyed. Subsequent to the grant oil or gas is discovered on the premises. This presents the issue of the meaning

¹ 156 Neb. 269, 55 N.W.2d 673 (1952).

of the word "minerals" contained in the original reservation. All of the courts agree that this is essentially a question of the interpretation of the intent of the parties to the conveyance or the intent of the donor if the transfer was by gift. But there is no agreement as to how the question of the intent of the parties is to be resolved.

Some courts use an objective test of intent. They hold that the word "minerals" is not ambiguous, and that it clearly includes oil and gas² since the true meaning of the word, as derived from dictionaries and other similar authorities, includes oil and gas. Since the word "minerals" is unambiguous, extrinsic evidence of the intent of the parties is inadmissible.³ The reservation would be effectual to reserve oil and gas even if there was no oil and gas in the vicinity before the grant and thus the parties would not likely have a specific intent to reserve oil and gas.⁴

If the scientific meaning of the word "minerals" is to be taken, oil and gas would not be included. Scientifically oil and gas are considered as hydrocarbons,⁵ or organic substances, while minerals are classed as inorganic compounds. But this line of authority has held that the term "minerals" is unambiguous and includes soil and gas despite this scientific definition. However, these courts would not insist that "minerals" includes oil and gas if it affirmatively appeared from the terms of the reservation that a contrary meaning was intended,⁶ as where there were additional words in the conveyance limiting its meaning.

Other courts use a subjective test of the intent of the parties. They hold that the word is ambiguous and so extrinsic evidence of the intent of the parties is admissible to resolve the ambiguity.⁷ If the reservation is unambiguous it is a question for the court to decide⁸ but if the term "minerals" is construed to be ambiguous then the determination of intent is a jury question. The case may not even be taken from the jury where it is shown that oil and gas had not been discovered in the vicinity at the time of the conveyance.⁹

² *Murray v. Allard*, 100 Tenn. 100, 43 S.W. 355 (1897); *Weaver v. Richards*, 156 Mich. 320, 120 N.W. 818 (1909).

³ *Bland v. Kentucky Coal Corp.*, 306 Ky. 1, 206 S.W.2d 62 (1947); *Federal Gas, Oil and Coal Co. v. Moore*, 290 Ky. 284, 116 S.W.2d 46 (1942); *Anderson & Kerr Drilling Co. v. Bruhlmeier*, 134 Tex. 574, 136 S.W.2d 800 (1940); *Roth v. Huser*, 147 Kan. 433, 76 P.2d 871 (1938); *Warner v. Patton*, 19 S.W.2d 1111 (Tex. Civ. App. 1929).

⁴ *Federal Gas, Oil and Coal Co. v. Moore*, 290 Ky. 284, 161 S.W.2d 46 (1942); *Luse v. Boatman*, 217 S.W. 1096 (Tex. Civ. App. 1919).

⁵ *Carthers v. Mills*, 233 S.W. 155, 157 (Tex. Civ. App. 1921).

⁶ *Horse Creek Land & Mining Co. v. Midkiff*, 1 W.Va. 616, 95 S.E. 26 (1918).

⁷ *McKinney's Heirs v. Central Kentucky Gas Co.*, 134 Ky. 239, 120 S.W. 314 (1909); *Rock House Fork Land Co. v. Raleigh, Brick & Tile Co.*, 83 W.Va. 20, 97 S.E. 684 (1918).

⁸ *Weaver v. Richards*, 156 Mich. 320, 120 N.W. 818 (1909) (directed verdict on construction of word "minerals" as including oil and gas affirmed).

⁹ See note 5 *supra*.

If the word "minerals" is considered to be ambiguous, there are certain factors that the courts will use in determining whether oil and gas are intended to be included. Thus, if it was unknown that there was oil and gas in the vicinity of the lands at the time the original reservation was made, it could not have been intended that oil and gas were being reserved.¹⁰ Oil and gas will not be included within the term "minerals" if they were not generally considered by the community as "minerals" at the time the conveyance was made,¹¹ but the general understanding of the community must be shown.¹² The reservation of "minerals" would more than likely include oil and gas if it were made today. The problem of determining whether oil and gas were known at the time of the conveyance becomes important only when the court is presented with the problem of construing a reservation that had been made many years before the case arose.¹³

Another factor that the courts look to is the inference that can be drawn from the surrounding circumstances.¹⁴ Thus, where the grantee of the "mineral" interest was engaged exclusively in the mining of coal, the court held that oil and gas were not included within the reservation.¹⁵

Additional language in the reservation can also be used to resolve the ambiguity and determine the intent of the parties. Thus, where a reservation of "minerals" was followed by the right to extract coal the court held that oil and gas were not included.¹⁶ Also, where the reservation included "all minerals, such as coal, iron, silver, copper, lead, bismuth, antimony, zinc or any other mineral of any marketable

¹⁰ *Detlor v. Loland*, 57 Ohio St. 492, 49 N.E. 690 (1898). But see *Maynard v. McHenry*, 271 Ky. 642, 113 S.W.2d 13 (1918) (where fact that oil had not been discovered in the vicinity at the time of the conveyance was immaterial).

A similar problem is presented in cases involving federal land grants to railroads. The issue was presented in *Burke v. Southern Pacific R.R.* 234 U.S. (1913) whether the granting act excluding "all mineral lands" also excluded oil and gas within the term "mineral." The court said that at the time the exception of mineral lands was made, the production of oil and gas had become a promising industry and so was included within the term "mineral." To same effect see *United States v. Northern Pacific Ry.*, 311 U.S. 317 (1940).

¹¹ *Missouri Pacific Ry. v. Strohacker*, 202 Ark. 645, 152 S.W.2d 557 (1941); *Missouri Pacific Ry. v. Furgueron*, 210 Ark. 460, 19 S.W. 588 (1946).

¹² *Brizzolara v. Powell*, 241 Ark. 870, 218 S.W.2d 728 (1949).

¹³ See *Missouri Pacific Ry. v. Strohacker*, 202 Ark. 645, 152 S.W.2d 557 (1941).

¹⁴ *Rock House Fork Land Co. v. Raleigh Brick & Tile Co.*, 83 W.Va. 20, 97 S.E. 684 (1918).

¹⁵ *Monon Coal Co. v. Riggs*, 115 Ind. App. 236, 56 N.E.2d 672 (1944), rehearing denied 115 Ind. App. 236, 57 N.E.2d 598 (1944).

¹⁶ *Horse Creek Land and Mining Co. v. Mid Kiff*, 81 W.Va. 616, 95 S.E. 26 (1918). See *Rock House Fork Land Co. v. Raleigh Brick & Tile Co.*, 83 W.Va. 20, 97 S.E. 913 (1926) (where a reservation of "all minerals, coal, iron, etc." included oil and gas).

value," the court held that oil and gas were impliedly excluded by the enumeration of other minerals.¹⁷

A few cases have held that oil and gas are not included within the term "minerals" unless a contrary meaning appears as the intent of the parties.¹⁸ This rule raises a presumption of exclusion of oil and gas from the term "minerals."

The question of whether "minerals" includes oil and gas has never been presented in Nebraska. It seems quite likely, however, that oil and gas would be included, unless a positive intent appeared to exclude them. Since the court has admitted extrinsic evidence in construing ambiguous deeds,¹⁹ it might admit extrinsic evidence in construing an ambiguous reservation. Or the court could follow the authority which holds that oil and gas are included despite a contrary intent since the word "minerals" is unambiguous.

If the rule is applied that the intent of the parties is to govern and in fact the parties never considered the problem of whether the intended oil and gas to be included, then the question becomes one of determining which of the two parties should be given a windfall. There would seem to be no good reason to favor one over the other. But the whole problem can be avoided by careful draftsmanship. The phrase "including oil and gas" could be used to express the clear intent of the parties.

Repugnancy

When a reservation of "minerals" is construed to include oil and gas, or when oil and gas are expressly reserved, certain other problems are presented. Several cases have considered the problem of whether such a reservation would be void for repugnancy. It has been argued that when the fee title to real estate is conveyed, a reservation of a right in the grantor for subsequent control of the property is repugnant to the grant and is therefore a nullity.²⁰ However, this argument has been consistently denied²¹ on the theory that several estates can be created from a single tract of real property, one an interest in the surface and another an interest in the subsurface.²²

¹⁷ *McKinney's Heirs v. Central Kentucky Gas Co.*, 134 Ky. 239, 120 S.W. 314 (1909).

¹⁸ *Silver v. Bush*, 213 Pa. 195, 62 Atl. 832 (1906); *Preston v. South Penn Oil Co.*, 238 Pa. 301, 86 Atl. 203 (1913).

¹⁹ The Nebraska court follows the general rule that extrinsic evidence of the surrounding circumstances is admissible if the deed is ambiguous. *Hart v. Saunders*, 74 Neb. 818, 105 N.W. 709 (1905). But if the deed is unambiguous its meaning must be determined by looking only to the instrument and not to extrinsic evidence. *Heiser v. Brehm*, 117 Neb. 472, 221 N.W. 97 (1928).

²⁰ *Zaskey v. Farrow*, 159 Kan. 347, 154 P.2d 1013 (1945).

²¹ *Zaskey v. Farrow*, 159 Kan. 347, 154 P.2d 1013 (1945); *Barker v. Campbell-Ratcliff Land Co.*, 64 Okla. 249, 167 Pac. 468 (1917); *Foster v. Runk*, 109 Pa. 291, 2 Atl. 25 (1885).

²² See note 20 *supra*.

Reservation or Exception?

Another problem presented by the reservation of oil and gas is whether the interest retained is a reservation or an exception. This problem was presented in the *Elrod* case. Hattie Gifford conveyed certain land to Elrod and others as joint tenants "subject to and reserving to the grantor herein personally an undivided one-half ($\frac{1}{2}$) interest in and to all gas, oil or other minerals in, on or under said land herein conveyed" Hattie Gifford died intestate. Elrod brought suit to quiet title contending that the interest retained was a reservation, and thus personal and terminated at Hattie's death. The heirs claimed that the interest retained was an exception and so words of inheritance were unnecessary to permit them to inherit the one-half interest.

The courts usually say that if the conveyance is a "reservation," words of inheritance are necessary in order to reserve greater than a life estate interest.²³ Thus, the word "heirs" would be necessary for a reservation of oil and gas in perpetuity.²⁴ But if it is an "exception," words of inheritance are unnecessary to reserve an interest in fee.²⁵

A reservation is said to create a new right in the grantor which did not exist prior to the grant.²⁶ But an exception withdraws from the grant some part of the thing granted and title to the thing excepted remains in the grantor as if no grant had been made.²⁷

But the determination of the real issue of whether a reservation or exception was made is not so clear. The courts ordinarily say that this is a question of the intent of the parties, gathered from the entire instrument.²⁸ Even the use of the word "except" or "reserve" is not conclusive.²⁹ If the whole issue is a question of the determination of the intent of the parties, and not of characterizing the conveyance as either a "reservation" or an "exception," then it would seem to be useless to begin analysis by attempting to characterize the conveyance as one or the other.

The test for determining the intent of the parties is likewise unclear. This issue is whether the parties intended that a life interest or a fee

²³ *Dawson v. Western M. Ry.* 107 Md. 70, 68 Atl. 301 (1907); *Childs v. Boston & M. R.R.*, 213 Mass. 91, 99 N.E. 957 (1912).

²⁴ *Mandle v. Gharing*, 256 Pa. 121, 100 Atl. 535 (1917).

²⁵ *McIntire v. Lauckner*, 108 Me. 443, 81 Atl. 784 (1911); *Foster v. Smith*, 211 Mass. 411, 98 N.E. 693 (1912); *Lipsky v. Heller*, 199 Mass. 310, 85 N.E. 453 (1908).

²⁶ *Dickman v. Madison County Light & Power Co.*, 304 Ill. 470, 136 N.E. 790 (1922); *Ogden v. Straus Building Corp.*, 187 Wisc. 232, 202 N.W. 34 (1925).

²⁷ *Smith v. Furbish*, 68 N.H. 123, 44 Atl. 398 (1894); *Snoddy v. Bolen*, 122 Mo. 478, 24 S.W. 142 (1893); *Edwards v. Brusha*, 18 Okla. 234, 90 Pac. 727 (1907).

²⁸ *Elrod v. Heirs, Devises, etc.*, 156 Neb. 269, 55 N.W.2d 673 (1952).

²⁹ *Zimmerman v. Kirchner*, 151 Iowa 483, 131 N.W. 756 (1911); *Martin v. Cook*, 102 Mich. 267, 60 N.W. 679 (1894); *Jones v. Hoffman*, 149 Wisc. 30, 134 N.W. 1046 (1912).

be reserved. The Nebraska Court states that this question must be determined by looking at the instrument itself, since it is unambiguous.³⁰ Yet when the grantor uses the language "reserving to the grantor herein *personally*," the court holds that the reservation was not personal, but a fee interest was clearly intended. It would seem that this type of analysis gives the lawyer very little in the way of predicting the outcome of the next case.

Rights of the Grantor

A grantor or his heirs have certain rights to the land as an incident of the reservation. There is an implied right to carry on such operations on the land as are necessary for the production of oil and gas even though the right is not expressly retained,³¹ and so the grantor may enjoin the surface owner from interfering with such operations.³²

Also, the grantor may lease or assign his reserved interest.³³ When a separate estate is created by a reservation or exception it is not lost by nonuser or abandonment,³⁴ except in Louisiana³⁵ and Tennessee³⁶ and there by statute. If the owner of the surface interest were to attempt to take oil or gas the person holding the reserved interest could enjoin such action.³⁷

Conveyance for Limited Purpose

A reservation may also arise where land is conveyed for a limited purpose or use. Under such a conveyance the question of the right to oil and gas often arises. Similar problems arise where the land is acquired under the power of eminent domain.

The general rule in construing such a reservation is to hold that oil and gas would be included in the grant unless inclusion would be contrary to the purposes for which the grant was made. Thus, where a railroad company has acquired a right-of-way for "railway" purposes it is *not* entitled to extract oil and gas as against the owner of the land which is subject to the easement, or his heirs, since the extraction of

³⁰ See note 28 *supra*.

³¹ *Jenkins v. Depoyster*, 299 Ky. 500, 186 S.W.2d 14 (1945); *Babcock Lumber Co. v. Faust*, 156 Pa. Super. 19, 39 A.2d 298 (1944); *Harris v. Currie*, 142 Tex. 93 176 S.W.2d 302 (1944); *Porter v. Mack Mfg. Co.*, 65 W.Va. 636, 64 S.E. 853 (1909).

³² *Porter v. Mack Mfg. Co.*, 65 W. Va. 636, 64 S.E. 853 (1909).

³³ *Murray v. Allard*, 100 Tenn. 100, 43 S.W. 355 (1897); *Williams v. South Pen. Oil Co.*, 52 W. Va. 181, 43 S.E. 214 (1903).

³⁴ *Loomis v. Gulf Oil Corp.*, 123 S.W.2d 501 (Tex. Civ. App. 1939); *Claybrooke v. Barnes*, 18 Ark. 678, 22 S.W.2d 390 (1929); *Adams v. Elkhorn Coal Corp.*, 199 Ky. 612, 251 S.W. 654 (1923).

³⁵ *Louisiana Petroleum Co. v. Broussard*, 172 La. 613, 135 So. 1 (1931).

³⁶ *Tenn. Code. Ann.* § 7620.01 (Williams 1934).

³⁷ *Westmoreland Natural Gas Co. v. DeWitt*, 130 Pa. 235, 18 Atl. 724 (1889).

oil and gas is not considered to be a "railway" purpose.³⁸ This is true whether the railroad has a full right-of-way,³⁹ a right-of-way as a result of adverse user,⁴⁰ or acquired by eminent domain.⁴¹

A railroad is not entitled to oil and gas under the road which it has acquired by adverse possession even though there was no severance of the mineral estate from the surface before the starting of the adverse possession because there can be no use greater than the use for the right-of-way.⁴² This is contrary to the general theory of adverse possession that if there is no prior severance of the mineral estate from the surface, then adverse possession of the surface *will* include the minerals.⁴³

If the land reverted to the original owner because it had ceased being used for railway purposes, then the person entitled to the reversion could extract the oil and gas.⁴⁴ Of course, the owner of the oil and gas rights could not interfere with the operations of the railroad,⁴⁵ but short of interference could extract the oil and gas. The only way for the railroad company to be entitled to oil and gas beneath its roads is to take an absolute conveyance of the land.⁴⁶

A similar situation is presented when land is granted to a city for limited purposes. Again the general rule is that oil and gas would not be included in the grant if inclusion would be contrary to the purpose of the grant. Thus, a city could not produce oil and gas or lease for that purpose when it has acquired the land for use as a city airport,⁴⁷ or for a harbor,⁴⁸ to the extent that the drilling of wells, the erection of derricks and the production of oil or gas destroyed the use for airport or harbor purposes.

³⁸ *Aubert v. St. Louis-San Francisco Ry.*, 207 Okla. 537, 251 P.2d 190 (1953); *Right of Way Oil Co. v. Gladys City Oil, Gas & Mfg. Co.*, 106 Tex. 94, 157 S.W. 737 (1913).

³⁹ *Uhl v. Ohio River R.R.*, 51 Va. 106, 41 S.E. 340 (1902).

⁴⁰ *Michigan Central R.R. v. Garfield Petroleum Corp.*, 292 Mich. 373, 290 N.W. 833 (1940); *Consumer's Gas Trust Co. v. American Plate Glass Co.*, 162 Ind. 393, 68 N.E. 1020 (1903).

⁴¹ *Southern Pacific Ry. v. San Francisco Savings Union*, 146 Cal. 290, 79 Pac. 961 (1905).

⁴² See *Michigan Central R.R. v. Garfield Petroleum Co.*, 292 Mich. 373, 290 N.W. 833 (1940).

⁴³ *Gill v. Colton*, 12 F.2d 531 (4th Cir. 1926). See *Claybrooke v. Barnes*, 180 Ark. 678, 22 S.W.2d 390 (1929).

⁴⁴ *United States v. Ill. Cent. R.R.*, 187 F.2d 374 (7th Cir. 1951).

⁴⁵ *Magnolia Petroleum Co. v. St. Louis & San Francisco R.R.*, 194 Okla. 435, 152 P.2d 367 (1944); *Midland Valley R.R. v. Sutter*, 28 F.2d 163 (8th Cir. 1928).

⁴⁶ *Whelan v. Johnston*, 192 Miss. 673, 6 So.2d 300 (1942); *Nelson v. Texas & Pacific Ry.*, 152 La. 117, 92 So. 754 (1922).

⁴⁷ *Moore v. Gordon*, 122 S.W.2d 239 (Tex. Civ. App. 1938); *City of Fort Worth v. Burnett*, 114 S.W.2d 220 (Tex. Civ. App. 1938).

⁴⁸ *Stone v. City of Los Angeles*, 114 Cal. App. 192, 299 Pac. 838 (1931).

If the city has an easement for use of certain land as streets, it has no right to the oil and gas, and the abutting owner can drain.⁴⁰ It is only when the city owns the streets in fee that it is entitled to the oil and gas found thereunder.⁵⁰ The city can produce the oil or gas, however, only if it would not interfere with the use as a public street.⁵¹ The city may be entitled to royalties whether it can produce or not if the area is unitized, giving each owner his proportionate share.⁵²

When the city owns the fee, it can prevent whipstocking under the street.⁵³ Of course, it could not prevent drainage of the gas or oil by abutting landowners since there is no right to prevent drainage except by drilling an offset well.

There is disagreement as to whether a conveyance to a school district for "school purposes" includes the right to recover oil and gas. Some courts hold that oil and gas production is not a school purpose,⁵⁴ but others permit it if the school use continues and oil and gas production does not unreasonably interfere with the intended use.⁵⁵

A grant to a church for "church purposes" will not prevent the production of oil and gas so long as the premises continue to be used for church purposes⁵⁶ unless there is a clear intent in the grant to exclude any other use.⁵⁷ But if the grant is to a church for "cemetery purposes" the land can not be used for oil and gas production so long as bodies remain interred,⁵⁸ but may be permitted on an unused portion of the cemetery.⁵⁹

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⁴⁰ *Wencker v. Ry. Comm.*, 149 S.W.2d 1009 (Tex. Civ. App. 1941).

⁵⁰ *Town of Refugio v. Strauch*, 29 S.W.2d 1041 (Tex. Com. App. 1930).

⁵¹ *Boone v. Clark*, 214 S.W. 607 (Tex. Civ. App. 1919).

⁵² But see *Wencker v. Ry. Comm.*, 145 S.W.2d 1009 (Tex. Civ. App. 1941) (Where city is not entitled to oil and gas even though it owns the fee in absence of unitization).

⁵³ *Lambach v. Town of Mason*, 386 Ill. 41, 53 N.E.2d 601 (1944); *Denio v. City of Huntington Beach*, 22 Cal.2d 580, 140 P.2d 392 (1942).

⁵⁴ *United Fuel Gas Co. v. Morley Oil & Gas Co.*, 102 W. Va. 374, 135 S.E. 399 (1926).

⁵⁵ *Williams v. McKenzie*, 203 Ky. 376, 262 S.W. 598 (1924); *Puddy v. School Dist.*, 92 Okla. 254, 219 Pac. 141 (1923); *O'Donnell v. Robson*, 239 Ill. 634, 88 N.E. 175 (1909).

⁵⁶ *Carlsen v. Carter*, 377 Ill. 484, 36 N.E.2d 740 (1941); *Regular Predestinarian Baptist Church of Pleasant Grove v. Parker*, 373 Ill. 607, 27 N.E.2d 522 (1940); *Davis v. Skipper*, 125 Tex. 364, 83 S.W.2d 318 (1935).

⁵⁷ *Union Missionary Baptist Church v. Fyke*, 197 Okla. 102, 64 P.2d 1203 (1937).

⁵⁸ *Barker v. Hazel-Fain Oil Co.*, 219 S.W. 874 (Tex. Civ. App. 1920).

⁵⁹ *Meadows v. Edwards*, 116 S.W.2d 831 (Tex. Civ. App. 1938); *Houston Oil Co. v. Williams*, 57 S.W.2d 380 (Tex. Civ. App. 1933).